Petition

81-2033

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ABC CONTAINERLINE, N.V., A/B HELSINGFORS STEAMSHIP, CO., LTD., ALIANZA NAVIERA ARGENTINA, S.A., GULFCOAST TRANSIT COMPANY, and NAVIOS CORPORATION,
Petitioners,

v.

KINGSTON SHIPPING, CO., INC. and APEX MARINE CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether, under the general maritime law of the United States, vessels entering into or departing from a port may recover foreseeable, direct, calculable financial losses sustained during the periods of delay which were incurred as a result of the closing of the port due to a collision caused by the negligence of another vessel.

PARTIES OF INTEREST

The following listed persons have an interest in the decision of this case.[1]

ABC Containerline, M.V.
A/B Helsingfors Steamship Co., Ltd.
Alianza Naviera Argentina, S.A.
Apex Marine Corporation
Gulfcoast Transit Company
Kingston Shipping Co., Inc.
Navios Corporation

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1 Seventy other original parties to this action, who are identified in the Appendix, were either death, personal injury or property claimants and have settled or otherwise terminated their claims against Respondents.

TABLE OF CONTENTS

Page

Question Presented for Review i

Parties of Interest ii

Table of Authorities.....iv

Opinions of Lower Courts.....2

Jurisdiction.....3

Statement of the Case 5

Reasons for Allowance of the Writ 8

Introductory Statement.....8

The Importance of the Issue 9

The Conflicts Between the Circuit Courts of Appeal.....18

Conclusion.....27

Appendix.....A-1

TABLE OF AUTHORITIES

Cases	Page
Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc)	3
Burgess v. M/V TAMANO, 370 F. Supp. 247 (S.D. Maine 1973) aff'd. mem. 559 F.2d 1200 (1st Cir. 1977)	22, 23
The DEL RIO, 298 F.2d 178 (9th Cir. 1953)	20
Dick Meyers Towing Service, Inc. v. United States, 577 F.2d 1023 (5th Cir. 1978)	19
Federal Commerce & Navigation Co. v. M/V MARATHONIAN, 528 F.2d 907 (2d Cir. 1975)	20
Ferry Pass Inspectors' & Shippers' Ass'n. v. White's River Inspectors' & Shippers' Ass'n., 48 So. 643 (Fla. 1909)	16
Gilman v. Philadelphia, 70 U.S. 713, 18 L.E. 96 (1866)	15
Kingston Shipping Co. Inc. v. Jeanette Roberts, et al., 667 F.2d 34 (11th Cir. 1982)	13, A-2, A-5

Kingston Shipping Co., Inc., v. Jeanette Roberts, et al.!oe, G.C. Carr, J., memorandum decision A-10

Marine Navigation Sulpher Carriers, Inc. v. Lone Star Industries, Inc., et al., 638 F.2d 700 (4th Cir. 1981) 18

Martin v. Lessee of Waddel, 41 U.S. 367, 10 L.E. 997 (1842) 15

Micmar Motorships Corp. v. Cabaneli Naviera S.A., 477 F. Supp 45 (E.D. La. 1979) 24

Petitions of the Kinsman Transit Co., 388 F.2d 821 (2d Cir. 1968) 16, 17, 20, 21

Re China Union Lines Ltd., 285 F. Supp. 426 (S.D. Tex. 1967) 24

Re Lyra Shipping Co. Ltd., 360 F. Supp. 1188 (E.D. La. 1973) 24

Robins Dry Dock and Repair Co. v. Flint, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927) 8, 11, 12, 13, 14, 17, 18, 19, 20, 25, 26

Union Oil Co. v. Oppen,
501 F.2d 558 (9th Cir. 1974) 21, 22

United States v. Reliable Transfer Co., Inc., 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975) 10, 11

Statutes

28 USC § 1254(1) 4

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

ABC CONTAINERLINE, N.V., A/B HELSINGFORS STEAMSHIP CO., LTD., ALIANZA NAVIERA ARGENTINA, S.A., GULFCOAST TRANSIT COMPANY, and NAVIOS CORPORATION,
Petitioners,

v.

KINGSTON SHIPPING CO., INC. and
APEX MARINE CORPORATION, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on February 4, 1982.

OPINIONS OF LOWER COURTS

The per curiam opinion of the Court of Appeals for the Eleventh Circuit appears in the Appendix to this Petition. The opinion rendered by the District Court for the Middle District of Florida, Tampa Division, is similarly included.

JURISDICTION

The judgment rendered by the Court of Appeals for the Eleventh Circuit sought to be reviewed in this case was entered on February 4, 1982. The time of said entry was not recorded. The appeal was filed in the original Court of Appeals for the Fifth Circuit prior to the creation of the Eleventh Circuit which has adopted the case law of the former tribunal.[2]

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2 Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

Accordingly, no Petition for Rehearing en banc was deemed appropriate. This Petition for Certiorari was filed within ninety days of the aforesaid judgment. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

During the evening of January 28, 1980, the S/S CAPRICORN, owned by Respondent Kingston Shipping Co., Inc. and operated under a bareboat charter to Respondent Apex Marine Corp., was proceeding inbound in Tampa Bay, Florida. At the same time, the United States Coast Guard Buoy Tender BLACKTHORN was proceeding outbound from Tampa Bay. While the vessels were so proceeding at a point near the intersection of Mullet Key Channel and Cut "A" Channel, approximately one mile from the Sunshine Skyway Bridge, the S/S CAPRICORN struck the Buoy Tender BLACKTHORN, causing the latter vessel to sink in the main shipping channel of Tampa Bay. As a direct and immediate consequence of the collision, the sunken

BLACKTHORN obstructed the port's only deep draft shipping channel thereby closing the port to navigation by deep draft vessels until February 22, 1980, when the BLACKTHORN was raised and removed from the channel.

Petitioners, ABC CONTAINERLINE, N.V., A/B HELSINGFORS STEAMSHIP COMPANY, LTD., ALIANZA NAVIERA ARGENTINA, S.A., GULFCOAST TRANSIT COMPANY, and NAVIOS CORPORATION were owners and/or operators of deep draft vessels engaged in the carriage of cargo to or from terminal facilities located in Tampa Bay. At the time of the collision, the Petitioners' vessels were fully prepared to either sail from or enter the Port of Tampa, but were precluded from doing so due to the fact that the main shipping channel was blocked by the sunken BLACKTHORN. Accordingly, the Petitioners

were forced to incur stand-by or detention costs during the time that the channel was closed. The principal damages to Petitioners are the costs incurred in the maintenance of their vessels either in the stream or at dockside during the period of detention, and include expenses such as the payment of seaman's wages, provisions, wharfage charges, additional towing charges, fuel and loss of use of the vessel.

REASONS FOR ALLOWANCE OF THE WRIT

Introductory Statement

The Court of Appeals for the Eleventh Circuit, having previously adopted the case law of the Fifth Circuit, has relied on a fifty-five year old decision of this Court rendered in Robins Dry Dock and Repair Co. v. Flint, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927) which was followed by the Fifth Circuit in several cases that are also cited by the per curiam decision of the Court of Appeals in this case. Petitioners respectfully contend that the Eleventh Circuit, in its own case of first impression, has enlarged a conflict within the circuits and has also misapplied the Robins rule in deciding an important issue. Robins essentially held that a

charterer had no proprietary interest in a chartered vessel which would give rise to a claim for ancillary damages resulting from delays in returning the vessel to service caused by a shipyard's negligent repair. In that case the terms of the charter excused the charterer from the payment of hire during the relevant period.

The Importance of the Issue

The issue presented to this Court is a substantial one that has a serious effect upon the nation's shrinking merchant marine. The complement of vessels in the American fleet has already decreased considerably due to fierce competition from fleets of other nations in the carriage of this country's imported and exported goods, and also due to the industry's in-

creasingly burdensome costs of operation. The failure to permit recovery to shipowners who are victims of costly delays caused by the negligence of another shipowner has serious economic repercussions. Indeed, the issue is of greater importance than the landmark collision case in the admiralty law of the United States decided in United States v. Reliable Transfer Co., Inc., 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975) in which this Court modified a long standing principle pertaining to the measure of damages to be applied to recoveries of vessels in collision. However, Reliable provides no relief to that larger group of shipowners who are immediately adversely affected by a collision which causes delays to their vessels. This Court, nearly a decade ago, determined the issue

in Reliable to be of sufficient interest to warrant the granting of certiorari. Petitioners respectfully submit that their cause is of substantially greater consequence to a distressed industry than the Reliable issue which, of necessity, only affects the shipowners and insurance underwriters whose vessels are actually involved in a collision.

Contrary to the Robins era, modern shipping encompasses the use of advanced technological equipment such as radar, highly proficient bridge to bridge radio communication, and bow thrusters as an aid to steering in navigation. Additionally, the recent development of maritime training programs has produced highly skilled personnel to man modern vessels. Therefore, it is not inequitable or burdensome, but only reasonable and proper

to impose a greater duty of care upon vessels currently plowing the navigable waters of the United States to act in a manner which will not cause harm to other users of such public resources. To limit recovery to those parties who sustain physical damage to their property in a cause of collision rather than to also compensate those who have incurred direct and immediate financial loss as a result of a vessel's negligence is inconsistent with modern enlightened American jurisprudence.

The issue in Robins was succinctly stated by Mr. Justice Holmes as "whether the Respondents have an interest protected by the law against unintended injuries inflicted upon the vessel by third persons who knew nothing of the charter." 275 U.S. at 308. In the context of a fac-

tual situation presented to this Court more than fifty years ago, Mr. Justice Holmes further stated "as a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong." Id. at 309. Accordingly, despite the fact that the case at bar does not involve contractual losses, the Court of Appeals reached the following general and overly broad conclusion: "Robins made clear that a party may not recover for economic losses not associated with physical damages."[3]

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3 Kingston Shipping Co., Inc., v. Jeanette Roberts, et al., 667 F.2d 34, 35 (11th Cir. 1982).

Such a construction of this Court's earlier decision is not only inaccurate as it relates to the instant case, but intolerable to the modern shipping community which must bear today's inflated expenses pertaining to fuel, wages, repairs, and costly obsolescence. Unfortunately, in the present day industry the axiom that "time is money" is more applicable than ever and the harsh result of the lower court's decision must be reconsidered.

The fallacy of applying the Robins doctrine to the case at bar is that Petitioners, unlike the petitioner in Robins, have both a proprietory interest in their respective vessels and a right to use the nation's waterways, each of which must be protected. Accordingly, they are entitled to recover their losses under

basic principles of negligence and maritime tort.

Petitioners, as users of the navigable waterways of the United States, have a right to the unrestricted access to such public resources and Respondents' tortious conduct in obstructing the channel was a breach of that right. Access to this country's navigable waters has always been deemed to be part of the public rights as noted in early decisions of this Court. In Martin v. Lessee of Waddell, 41 U.S. 367, 10 L.E. 997 (1842) the Court traced the question to the crown grants of colonial property in confirming this right. In Gilman v. Philadelphia, 70 U.S. 713, 18 L.E. 96 (1866) this Court noted that the navigable waters of the United States are the public property of the nation.

Users of public waterways have a duty to act in a non-negligent manner with respect to such use. This principle has been acknowledged in Florida since its early settlement. The Florida Supreme Court, in Ferry Pass Inspectors' and Shippers' Ass'n v. White's River Inspectors' and Shippers' Ass'n, 48 So.643 (Fla. 1909), a case concerning a riparian land owner's use of the water for his own navigation, held that:

> The right of navigation should be so used and enjoyed as not to infringe on the lawful right of others.

Id. at 645.

The Second Circuit has correctly analyzed a similar, although not identical, situation in Petitions of the Kinsman Transit Co., 388 F.2d 821 (2d Cir. 1968) in which that court denied claims of

delay claimants not on the basis of the Robins doctrine, but as a result of a failure to demonstrate that the losses were proximately caused by the negligent shipowner who sought to limit his liability in the case, and more importantly, to demonstrate that said losses were within the reasonably foreseeable risk of harm.[4]

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4 The Second Circuit's comments in Note 8 of the opinion in Kinsman are not applicable to the instant case due to the fact that truckers or carriers denied access to or egress from the Brooklyn Battery Tunnel could eventually gain access to Manhattan Island by alternative use of other tunnels or bridges within a reasonable period of time whereas petitioners in the case at bar were prevented from entering or departing the port of Tampa for approximately 25 days with no alternative means of relief.

The Conflicts Between The Circuit Courts of Appeal

In reliance on Robins, the Fifth Circuit and, a result of the decision of the court below, the Eleventh Circuit have ruled that a party cannot, in a maritime cause of action, recover economic losses which are not associated with physical damage. In theory, those courts conclude that all such losses are the result of negligent but unintentional interference with contractual relations and therefore, are not actionable regardless of any independent facts which might not be consistent with the facts in Robins. The Fourth Circuit has similarly applied Robins in Marine Navigation Sulpher Carriers, Inc. v. Lone Star Industries, Inc., et al., 638 F.2d 700, 702 (4th Cir. 1981) wherein that court denied recovery

to delay claimants who did not allege or prove physical damage to their property or persons.

Despite the evolution of the Robins progeny in the Fourth and Fifth Circuits, differing views which give precedence to standard principles of maritime tort have been espoused by other major maritime jurisdictions.[5] The Second and Ninth Circuits, unlike the Fourth, Fifth and Eleventh Circuits, refuse to follow the broad interpretation of Robins in cases

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5 The Fifth Circuit has, as indicated in Note 3 to its opinion in Dick Meyers Towing Service, Inc. v. United States, 577 F.2d 1023 (5th Cir. 1978), acknowledged the existence of a conflict in the application of Robins.

in which the claiming party was not personally involved in the collision but suffered financial losses that are not dependent on a contractual theory.[6] In rejecting the argument that the Robins doctrine applies to such situations, the Second Circuit in Kinsman determined:

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6 However, the Second and Ninth Circuits follow Robins in the limited situations in which the facts of the case presented are consistent with the Robins case that involved an action brought by a time charterer for delay damages resulting from the negligent acts of a shipyard (or presumably to be applied to other culpable parties) in an instance in which the charterer has been relieved from payment of hire during the period of delay. The damages in such instances are of an economic expectancy resulting from the charterer's loss of use of the vessel and thus are not recoverable. Federal Commerce and Navigation Co. v. M/V MARATHONIAN, 528 F.2d 907 (2d Cir. 1975), The DEL RIO, 209 F.2d 178 (9th Cir. 1953).

> We therefore prefer to leave the rock-strewn path of 'negligent interference with contract' for more familiar tort terrain. Cargill & Cargo Carriers argue broadly that they suffered damage as a result of defendant's negligence and we will deal with their claims in these terms instead of the more esoteric 'negligent interference' ground.

388 F.2d at 823-24.

In the Ninth Circuit the Court in Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974) held that under either admiralty or pertinent state law, two parties who make direct use of the sea in the ordinary course of their business owe to each other the duty of conducting their commercial enterprises in a prudent manner. Neither party should be permitted to negligently inflict financial injury

upon the other. Although the claimants in Oppen were commercial fishermen, Petitioners contend that there is no difference in principle between the loss to a fisherman of the resources of waterways or seas, i.e. his catch, and the loss to shipowners of those resources, i.e. a mode of transportation. Both of the foregoing interests derive their livelihood from the nation's waterways and should be afforded the same protection.

Furthermore, in a similar case under the admiralty and maritime jurisdiction of the First Circuit in the matter of Burgess v. M/V TAMANO, 370 F. Supp. 247 (S.D. Maine 1973) aff'd. mem. 559 F.2d 1200 (1st Cir. 1977), the court affirmed a lower court ruling that an individual can recover in tort for invasion of public rights if the damages suffered are dif-

ferent in kind from those sustained by the public generally. Specifically, the claimants in TAMANO were deprived of commercial use of a public right (the coastal waters of the State of Maine) by the defendant's negligent and tortious interference with that right. In the instant case, the Petitioners' particular loss of use of the waterway is more readily apparent because shallow draft vessels were not similarly affected due to the fact that they were not restricted to the main shipping channel which was closed to Petitioners by Respondents' actions.

Moreover, lower courts in the Fifth Circuit have also recognized that a negligence - causation - foreseeability analysis should be applied to admiralty claims based on delays incurred due to ob-

struction of navigable waters.[7]

Simply stated, Petitioners in the instant case have obviously suffered damages as a result of Respondents' negligent action in causing a collision which closed the Port of Tampa to deep draft vessels. The harm so caused was clearly foreseeable since any vessel owner calling at a major port should be charged with knowledge that he is not the sole user of that port and that his tortious conduct in closing the main shipping channel would immediately cause calculable damages to the vessels which are delayed due to such action.

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7 Micmar Motorships Corp. v. Cabaneli Naviera S.A., 477 F. Supp. 45 (E.D. La. 1979); Re Lyra Shipping Co., Ltd., 360 F. Supp. 1188 (E.D. La. 1973); Re China Union Lines, Ltd., 285 F. Supp. 426 (S.D. Texas 1967).

The delay damages encountered by Petitioners resulted from the inactivity of their vessels, with attendant normally recurring expenses such as crew's wages, fuel consumed in the operation of the ship's plant while awaiting clearance to enter into or depart from the port, costs of additional towage required by the United States Coast Guard in order to use a limited area of the main channel after the port was open, etc. These "out of pocket" costs, in addition to the vessels' other fixed daily expenses such as debt service, are not related to contractual obligations nor do they constitute the loss of economic expectancy precluded by Robins.

Petitioners, as members of a troubled industry, submit that only this Court can grant the relief properly due them by set-

tling the issue of the scope of the Robins doctrine. It is readily apparent that Robins has been expanded beyond this Court's intention by some Circuit Courts which have applied unwarranted constraints beyond the purview of that decision in determining the rights of third parties in a maritime collision. The instant case, in which vessels were literally trapped in a harbor as a result of Respondents' wrongdoing, presents a clear opportunity to define those rights.

CONCLUSION

Based upon the foregoing reasons Petitioners respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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Alianza Naviera Argentina, S.A.
Gulfcoast Transit Company
Navios Corporation

Appendix

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5343
Non-Argument Calendar

D.C. Docket No. 80-134-CIV-T-GC

In the Matter of the
Complaint of KINGSTON
SHIPPING CO., INC., et al.,

Plaintiffs-Appellees,

versus

JEANETTE ROBERTS, et al.,

Defendants,

POLISH STEAMSHIP COMPANY,
I.S. JOSEPH SHIPPING CO., LTD.,
I.S. JOSEPH CO., INC.,
CLIPER MARITIME CO., LTD.
PELL NEDERLAND, B.V.,
TERMAR NAVIGATION CO.,
TURBANA BANANA CORP.,
GULFCOAST TRANSIT CO.,
ABC CONTAINERLINE, N.V.,
WALLENIUS REDERIERNA &
MOTORSHIP, INC.,
A/B HELSINGFORS STEAMSHIPS
CO., LTD.,
ALIANZA NAVIERA ARGENTINA, S.A.,
MARTHANASSA COMPANIA NAVIERA,
S.A.,
NAVIOS CORP. & OCEANSIDE, LTD.,

Claimants-Appellants.

Appeal from the United States District Court for the Middle District of Florida.
BEFORE GODBOLD, Chief Judge, JOHNSON and ANDERSON, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and wastaken under submission by the Court upon the record and briefs on file pursuant to Rule 23;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed.

It is further ordered that Claimants-Appellants pay to Plaintiffs-Appellees the

costs on appeal to be taxed by the Clerk of this Court.

February 4, 1982

United States Court of Appeals,

Eleventh Circuit.

In the Matter of the Complaint of
KINGSTON SHIPPING CO., INC.,
et al., Plaintiffs-Appellees,

v.

Jeanette ROBERTS, et al., Defendants,

Polish Steamship Company, I.S. Joseph
Shipping Co., Ltd., I.S. Joseph Co., Inc.,
Clipper Maritime Co., Ltd., Pell
Nederland, B.V., Termar Navigation Co.,
Turbana Banana Corp., Gulfcoast Transit
Co., ABC Containerline, N.V., Wallenius
Rederierna & Motorship, Inc.,
A/B Helsingfors Steamships Co., Ltd.,
Alianza Naviera Argentina, S.A.,
Navios Corp. & Oceanside, Ltd.,
Claimants-Appellants.

No. 81-5343
Non-Argument Calendar.

Before GODBOLD, Chief Judge, JOHNSON and ANDERSON, Circuit Judges.

PER CURIAM:

Kingston Shipping Co., Inc., and Apex Marine Corp. filed an action in the United States District Court for the Middle District of Florida for "exoneration from or limitation of liability" growing out of a collision between the United States Coast Guard buoy tender BLACKTHORN and the S/S CAPRICORN that occurred in January 1980 in Tampa Bay. As a result of the collision, the BLACKTHORN sank in the main ship channel of the port of Tampa, blocking the channel and precluding deep draft vessels from either entering or departing until the wreckage was cleared about 26 days later. The owners of these "delayed-vessels" filed claims seeking to recover damages incurred as a result of their delayed passage into or out of the port of Tampa. Plaintiffs Kingston Shipping and Apex Marine moved to dismiss

the claims of the delayed-claimants and the district judge dismissed these claims for failure to state a claim upon which relief could be granted.

[1, 2] This case is governed by the rule set down in Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927) and adopted by the former Fifth Circuit. Vicksburg Towing Co. v. Mississippi Marine Transport Co., 609 F.2d 176 (5th Cir. 1980); Louisville and Nashville Railroad Co. v. M/V Bayou Lacombe, 597 F.2d 469 (5th Cir. 1979); Dick Meyers Towing Service, Inc. v. United States, 577 F.2d 1023 (5th Cir. 1978), cert. denied, 440 U.S. 908, 99 S.Ct. 1215,

59 L.Ed.2d 455 (1979).[1] Robins made clear that a party may not recover for economic losses not associated with physical damages. The court states: "as a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong." 275 U.S. at 309, 48 S.Ct. at 135.

Appellants' attempts to question the validity or applicability of the Robins

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[1] The Eleventh Circuit has adopted the case law of the former Fifth Circuit as its governing body of precedent. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

rule are without merit. In Louisville and Nashville, the former Fifth Circuit reaffirmed the validity of the rule: "Whatever the wisdom of the traditional rule of nonliability for negligent acts causing economic loss, Robins reflects the state of law in this circuit." 597 F.2d at 472.

The order of the district court is AFFIRMED. February 4, 1982.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

In the Matter of the Complaint of
KINGSTON SHIPPING CO. and
APEX MARINE CORP., for exoneration
from or limitation of liability as
owner of the S/S CAPRICORN

Case No. 80-134-Civ-T-GC

_____/

MEMORANDUM OPINION AND ORDER

This action for exoneration or limitation of liability was instituted in the wake of the collision between the S/S CAPRICORN and the Coast Guard buoy

tender BLACKTHORN which occurred on January 28, 1980. Because the collision resulted in the blockage of the main ship channel of the Port of Tampa, deep draft vessels were precluded from either entering or departing the Port until the wreckage was cleared. The owners of a number of these vessels (hereinafter referred to as "delay claimants") have filed claims in this action seeking to recover damages incurred as a result of their delayed passage into and out of the Tampa Port. Motions to dismiss the claims of the delay claimants have been filed by the Plaintiffs, and the Court heard oral argument on the Motions on February 24, 1981.

I.

The Plaintiffs contend that the delay claimants have not stated a claim upon which relief may be granted because their losses are solely economic in nature and were sustained without actual physical impact or damage. Primary reliance for this proposition is placed on the Supreme Court's decision in Robins Dry Dock and Repair Co. v. Flint, 275 U.S. 303 (1927), as well as a number of Fifth Circuit cases which adhere to the Robins rule that a negligent unintentional interference with contractual relations which results in a solely economic loss is not actionable. The delay claimants argue that (1) traditional tort principles have replaced (or at least should replace) the Robins negligent interference with contract analysis; (2) the facts in the instant

case are distinguishable from Robins; and (3) the alleged negligence of the Plaintiffs gives rise to claims predicated on maritime tort, common law negligence and nuisance, and the Rivers and Harbors Act, 33 U.S.C. § 401 et seq.

A. Robins in the Fifth Circuit:

Irrespective of its wisdom, Robins' traditional rule of nonliability for negligent acts causing economic loss prevails in the Fifth Circuit. See Louisville and Nashville Railroad Co. v. M/V Bayou Lacombe, 597 F.2d 469 (5th Cir. 1979); Dick Meyers Towing Service, Inc. v. United States, 577 F.2d 1023 (5th Cir. 1978); and Kaiser Aluminum and Chemical Corporation v. Marshland Dredging Company, 455 F.2d 957 (5th Cir. 1972). The key issue with respect to the Robins decision, therefore, is whether it is applicable to the facts

before the Court. It is argued by the delay claimants that direct, substantial and calculable damages were incurred by them as contrasted to the remote, speculative injury sustained by the Plaintiff time charterer in Robins. The delay claimants point out that recovery has been permitted by two other district courts in this Circuit in very similar circumstances in Petition of China Union Lines, Ltd., 285 F.Supp. 426 (S.D. Tex. 1967) and in In Re Lyra Shipping Co., Ltd., 360 F.Supp. 1188 (E.D. La. 1973).[1]

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[1] Cases from other jurisdictions have also been offered by the delay claimants in which the Courts have modified the strict nonliability for negligent interference with contract approach of Robins in favor of a more traditional tort analysis. See, for example, Petition of Kinsman Transit Co., 388 F.2d 821 (2nd Cir. 1968).

A review of the relevant case law reveals that the visability of the Robins rule in this Circuit is not dependent upon the Court's characterization of asserted damage claims as speculative or remote. Indeed, none of the claims which were held precluded by Robins in M/V Bayou Lacombe, Dick Meyers, or Kaiser, supra, were so described by the Court. Instead, the Fifth Circuit has repeatedly stated that in cases of this type "[t]he critical factor is the character of the interest harmed." M/V Bayou Lacombe, supra, 597 F.2d at 473, Dick Meyers, supra, 577 F.2d at 1025. Thus, as the Court in Dick Meyers was unpersuaded by the appellant's attempt to avoid the Robins rule by depicting its claim as the breach of a direct duty or as a private action

based on a public nuisance, 577 F.2d at 1025, this Court is unmoved by the delay claimants' contention that their claims sound in maritime tort, common law negligence and nuisance. Finally, this Court is not compelled to follow the district court decisions in In Re Lyra Shipping Co. and Petition of China Union Lines, Ltd., supra, which have escaped full appellate review and which are, in the view of this Court, inconsistent with the most recent articulations of the Robins rule in this Circuit.

B. The Rivers and Harbors Act:

The delay claimants contend that in addition to the theories urged above, a cause of action against the Plaintiffs exists pursuant to the Rivers and Harbors Act, 33 U.S.C. § 401 et seq. Under the authority of Lauritzen v. Chesapeake Bay

Bridge and Tunnel District, 404 F.2d 1001 (4th Cir. 1968), it is argued that the Plaintiffs may be privately sued for obstruction of navigable waters in violation of 33 U.S.C. § 403.[2]

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[2] 33 U.S.C. § 403 provides:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Review of relevant case law reveals that Lauritzen has been rejected in this Circuit, and that the Rivers and Harbors Act of 1899 does not create a private right of action. Intracoastal Transportation, Inc. v. Decatur County, Georgia, 482 F.2d 361 (5th Cir. 1973). Thus, the delay claimants' statutory theory predicated on the Act will not support their claims.

II.

The Court has reviewed all of the counts of the various delay claims, liberally construing them in favor of the delay claimants. Conley v. Gibson, 355 U.S. 41 (1957). Nonetheless, the Court concludes that in light of the foregoing, it appears to a certainty that the delay claimants would not be entitled

to recover under any state of facts which could be proved in support of their claims. Cook and Nichol, Inc. v. Plimsoll Club, 451 F.2d 505 (5th Cir. 1971). Accordingly, the Plaintiffs' Motions to Dismiss the delay claims are GRANTED.

DONE AND ORDERED in Chambers in Tampa, Florida, this 16th day of March, 1981.

George C. Carr
UNITED STATES DISTRICT JUDGE

FORMER PARTIES TO THE CASE

Lina B. Avila/death of Subrino Avila
Armada Shipping A.B.
Gladys L. Barbee/death of Brewer
Cheryl Barnaby
Charles Bartell
Bay-con Industries
Teresa Marina Boone
Donald M. Brooks
Clint Joseph Campangna'
Rickey Lee Chamness
Scott J. Chaplin
Clipper Maritime Co., Ltd.
Larry Clutter
Steven A. Coleman
David Crawford
Glenda Crumly
Billy Jim Dees
Rachel Estrada/death of Dan Estrada
Jewel T. & Bertha M. Faulkner
Rhondalyn Faulkner & for Thomas R. Faulkner (Rachelle Faulkner child and daughter of T.R. Faulkner)
Paul Florence
R.S. Flores & Julia G. Flores/ death of William R. Flores
Margaret Frank/death of Don Frank
Lawrence Frye/death of L.D. Frye
Mark C. Gatz
Ernest W. Gauld as PR of Richard Weston Gauld
Michael D. Gray
Frank Hall/death of D. Hall
Hannah Marine Corp.
Willard R. Harrison/death of Glen E. Harrison

Jeffrey L. Huse
I.S. Joseph Shipping Co., Ltd.
Bobby Lafont/death of David Lafont
Richelle LaFont
R.B. Litterell
Patrick J. Lucas
Joseph Luke & Justine Luke/
death of Michael K. Luke
David B. Marak
Marthanassa Compania
Naviera
Maxine R. Maxcy/death of
Danny R. Maxcy
Ronald G. McCray
Gloria Jean Morrow for
Glenda Morrow
Robert Niesel, Jr.
Oceanside Ltd.
Stephen G. Overby
Pell Nederland B.V.
Polish Steamship Company
Joseph E. & Myra J. Prosko/
death of John Edward Prosko
Renee Ressler/death of Jerome F. Ressler
Michael A. Rhodes
Jeanette Roberts/death of
Jack J. Roberts, Jr.
Richard DeWitt Robinson
Carmel D. Rovolis
Colleen R. Rovolis
James T. Rovolis
George R. Rovolis, Sr./death of
George R. Rovolis, Jr.
John Randolph Ryan
Frank Sarna/death of
Frank J. Sarna
George J. Sepel
Robert K. Shine
Shipmar B.V.

Edward F. Sindelar, Jr./
death of Edward F.
Sindelar, III
Efrain Solis, Jr.
Wanda E. Stidhem/death of
Luther David Stidhem
Termar Navigation, Inc.
Turbana Banana Corp.
Ultraocean S.A.
United States of America
Wallenius Rederierna Motorships, Inc.
Anthony M. Ware

Opposition

Office - Supreme Court, U.S.
FILED
JUN 9 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2033

IN THE

Supreme Court of the United States

October term, 1981

ABC CONTAINERLINE, N.V., A/B HELSINGFORS STEAMSHIP, CO. LTD., ALIANZA NAVIERA ARGENTINA, S.A., GULFCOAST TRANSIT COMPANY, and NAVIOS CORPORATION,
Petitioners,

v.

KINGSTON SHIPPING, CO., INC. and APEX MARINE CORPORATION,
Respondents.

ON PETITION for a WRIT of CERTIORARI to the UNITED STATES COURT of APPEALS for the ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS, KINGSTON SHIPPING CO., INC. AND APEX MARINE CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Should this Court review an affirmance of the rule of nonliability for negligent acts causing economic loss without physical damage, arising from delay to vessels in either entering or departing a port because of a blocked ship channel, set down in Robins Drydock & Repair Co. v. Flint, 275 U.S. 303 (1927), when the decision below was unanimous, the petitioners failed to seek a rehearing, and no conflict exists among the circuits in following the rule of nonliability?

PARTIES OF INTEREST

The undersigned counsel of record for respondents certifies that the following parties have an interest in the outcome of this case.

Kingston Shipping Co., Inc.;
Apex Marine Corporation;
I.S. Joseph Shipping Co., Ltd.;
I.S. Joseph Co., Inc.;
Clipper Maritime Co., Ltd.;
Pell Netherlands, B.V.;
Termar Navigation Co.;
Turbana Banana Corp., S.A.;
The United Kingdom Freight Demurrage and Defense Assoc., Ltd.;
Gulfcoast Transit Co.;
ABC Containerline, N.V.;
Wallenius Rederierna and Motorships, Inc.;
A/B Helsingfors Steamship Co., Ltd.;
Alianza Naviera Argentina, S.A.;
Marthanassa Compania Naviera, S.A.
Navios Corporation & Oceanside Limited;
Polish Steamship Co.

Signed,

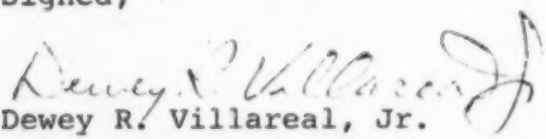

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TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW

Page

Questions Presented for Review..... i

Parties of Interest..... ii

Table of Contents..... iii

Table of Cases and Authorities..... v

Statement of the Case..... 1

Preliminary Statement and Proceedings Below..... 1

Statement of Facts..... 3

Summary of Argument..... 5

Argument..... 7

I. SINCE NO SPECIAL OR IMPORTANT REASON UNDER SUPREME COURT RULE 17.1 EXISTS AND THERE IS NO CONFLICT BETWEEN THIS DECISION AND THE DECISION OF ANOTHER CIRCUIT, THE PETITION SHOULD BE DENIED..... 7

II. SINCE THE DECISION BELOW CORRECTLY FOLLOWED THE RULE ESTABLISHED BY THIS COURT IN 1927 AND FOLLOWED BY ALL THE CIRCUITS, THE PETITION SHOULD BE DENIED..... 10

Should this Court review an affirmance of the rule of nonliability for negligent acts causing economic loss without physical damage, arising from delay to vessels in either entering or departing a port because of a blocked ship channel, set down in Robins Drydock & Repair Co. v. Flint, 275 U.S. 303 (1927), when the decision below was unanimous, the petitioners failed to seek a rehearing, and no conflict exists among the circuits in following the rule of nonliability?

A. Since The Complaint As A Matter Of Law Failed To State A Claim The Trial Court Correctly Dismissed It..... 10

B. Since Delay Claimants Showed No Physical Damage Or Damage To A Special Interest The Claims Were Properly Dismissed..... 12

C. Since No Damage To The Delay Claimants Exists Which Differs From That Suffered By The Public At Large, The Claim Was Properly Dismissed..... 19

D. Since Allowance Of Delay Claims Unaccompanied By Physical Or Special Damage Would Allow Recovery For Remote, Unforeseeable, And Speculative Damages And Increase The Class Of Plaintiffs Without Limit, Public Policy Supports The Decision Below..... 22

E. Because The Decision Of The District Courts Follows The Path Of Parallel Uniformity With British Law The Petition Should Be Denied..... 24

Conclusion..... 28

TABLE OF CONTENTS

Page

Questions Presented for Review..... i

Parties of Interest..... ii

Table of Contents.....iii

Table of Cases and Authorities..... v

Statement of the Case..... 1

Preliminary Statement and Proceedings Below..... 1

Statement of Facts..... 3

Summary of Argument..... 5

Argument..... 7

I. SINCE NO SPECIAL OR IMPORTANT REASON UNDER SUPREME COURT RULE 17.1 EXISTS AND THERE IS NO CONFLICT BETWEEN THIS DECISION AND THE DECISION OF ANOTHER CIRCUIT, THE PETITION SHOULD BE DENIED..... 7

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D. Since Allowance Of Delay Claims Unaccompanied By Physical Or Special Damage Would Allow Recovery For Remote, Unforeseeable, And Speculative Damages And Increase The Class Of Plaintiffs Without Limit, Public Policy Supports The Decision Below..... 22

E. Because The Decision Of The District Courts Follows The Path Of Parallel Uniformity With British Law The Petition Should Be Denied..... 24

Conclusion..... 28

TABLE OF CASES AND AUTHORITIES

Cases

Page

Associated Builders Inc. v. Alabama Power Co. 505 F.2d 97 (5th Cir. 1974)..... 10,11

Complaint of Bethlehem Steel Corp., 449 F.Supp. 681 (N.D. Ohio 1977), aff'd 631 F.2d 441 (6th Cir. 1980)..... 17

Burgess v. M/V TAMANO, 370 F.Supp. 247 (D.Me. 1973) aff'd mem. 559 F.2d 1200 (1st Cir. 1977)..... 18, 19, 21

Bustop Shelters Inc. v. Convenience and Safety Corp., 521 F.Supp. 989 (S.D.N.Y. 1981)..... 11

Calmar S.S. Corp. v. Scott, 345 U.S. 427, 433 (1953)..... 24

Clebanow v. New York Produce Exchange, 344 F.2d 294 (2nd Cir. 1965)..... 11

Conley v. Gibson, 355 U.S. 41 (1957)..... 10

Cory v. Burr, 9 Q.B.D. 463, 469 (C.A. 1882), aff'd 8 App. Cas. 393 (H.L. 1883)..... 24

Dick Meyers Towing Service Inc. v. United States, 577 F.2d 1023 (5th Cir. 1978), cert. denied 440 U.S. 908 (1979)..... 13, 15

General Foods v. United States, 448 F.Supp. 111 (D.Md. 1978)... 17

Highland Dairy Inc. v. Kroger Co., 402 F.2d 968 (8th Cir. 1968), cert. denied 395 U.S. 961 (19)..... 11

Kaiser Aluminum & Chem. Corp. v. Marshland Dredging Co., 455 F.2d 957 (5th Cir. 1972)..... 16

In re Kinsman Transit Co., 388 F.2d 821 (2nd Cir. 1968)..... 20

Link v. General Ins. Co. (The Roustabout), 56 F.Supp. 275, 276 (W.D.Wash. 1944)..... 25

Louisville & N.R. Co. v. M/V Bayou Lacombe, 597 F.2d 469 (5th Cir. 1979)..... 16

Marine Nav. Sulphur Carriers v. Lone Star Indus., 638 F.2d 700 (4th Cir. 1981)..... 18

Oppen v. Aetna Ins. Co., 485 F.2d 252, 260 (9th Cir. 1973).....14, 21

Pauling v. McElroy 278 F.2d 252 (D.C.Cir. 1960), cert. denied 364 U.S. 835 (1960)..... 11

Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co., 263 U.S. 487, 493 (1924)..... 24

Robins Drydock & Repair Co. v. Flint, 275 U.S. 303, 309, 310 (1927).. .....i, 5, 6, 12, 13, 15, 16, 20, 22

THE SPOT PACK, (not reported in F.2d) 1957 A.M.C. 655, 661 (5th Cir. 1957)..... 25

Stanton v. United States, 434 F.2d 1273 (5th Cir. 1979)..... 11

Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974).....18, 19, 21

Webb v. Standard Oil Co., 414 F.2d 320 (5th Cir. 1969)..... 10

Statutes Cited

46 U.S.C. Section 183..... 2

Rules Cited

Rules of the Supreme Court of the United States, Rule 17.1.... 7, 8, 9

Treatises and Other Authorities

Diplock, The Admiralty Law Institute: Closing Remarks, 41 Tul.L.Rev. 433, 434 (1967)..... 25

Heydon, Economic Torts 1 (Sweet and Maxwell, 1973)..... 25, 26, 27

Prosser, Law of Torts Section 88 at 591 (4th ed. 1971)..... 22

Restatement (2nd) of Torts, Section 776C at 23, 24 (1979).....23, 24

Talley, A Well-Plead Complaint--The Key To Recovery of Economic Damages for Delay in Admiralty, 9 Fla. St.U.L.Rev. 351 (1981)... 13

Tetreault, The Hull Policy: The Inchmaree Clause, 41 Tul. L.Rev. 325, 344 (1967)..... 25

STATEMENT OF THE CASE

PRELIMINARY STATEMENT AND PROCEEDINGS BELOW

The petition of ABC Containerline, N.V., A/B Helsingfors Steamship Co., Ltd., Alianza Naviera Argentina, S.A., Gulfcoast Transit Co., and Navios Corporation[1] for a writ of certiorari from the affirmance on appeal of an order dismissing their detention or delay claims[2]

---

[1]The petitioners here will be referred to as the delay claimants; respondents, Kingston Shipping and Apex Marine will be referred to in the singular as "the CAPRICORN."

[2]The delay claims were for pure economic loss without any physical loss or damage.

for failure to state a claim upon which relief could be granted, brings this action before this Court.

Jurisdiction of the United States District Court was based on the limitation of liability statutes of the United States, 46 U.S.C. Section 183.

All delay claimants filed answers and also filed claims against the CAPRICORN in the limitation proceeding. The CAPRICORN moved to dismiss each delay claim for failure to state a claim upon which relief could be granted. On February 24, 1981, the District Court heard oral arguments on motion to dismiss and then granted the motions and dismissed the claims. All delay claimants above filed timely notice of appeal.

The Eleventh Circuit Court of Appeals set the case on its non-argument

calendar and affirmed the District Court's decision in a four page per curiam decision on February 4, 1982. The delay claimants failed to file an application for rehearing.

The record below is devoid of other facts.

STATEMENT OF FACTS

The CAPRICORN petitioned for exoneration from or limitation of liability in the wake of the collision between the U.S. Coast Guard Buoytender BLACKTHORN and the SS CAPRICORN on January 28, 1980 in Tampa Bay, Florida. The collision caused the BLACKTHORN to sink, blocking the main ship channel of the port of Tampa and precluding deep-draft vessels from either entering or departing until the wreckage was cleared about 26 days later. The owners of a number of these vessels filed claims seeking to recover alleged damages resulting from their delayed passage into or out of the port of Tampa. The CAPRICORN moved to dismiss the claims of the delay claimants contending that delay claimants did not

state a claim upon which relief could be granted because their losses were solely economic in nature, sustained without physical impact or damage, were not direct, and were too remote.

The Eleventh Circuit Court of Appeals affirmed the District Court's decision per curiam on February 4, 1982. Appendix A-5, Petition for Cert. The delay claimants filed no application for rehearing.

The record at this time is devoid of any other facts.

SUMMARY OF ARGUMENT

There are no special or important reasons, under Supreme Court Rule 17.1, for this Court to review this case, nor is there any conflict between this decision and a decision of another federal court of appeals.

All of the delay claims are for economic loss without accompanying physical damage, despite their artful characterization. This Court has consistently followed the rule in Robins Drydock & Repair Co. v. Flint, 275 U.S. 303, 309, 310 (1927) of nonliability for negligent acts causing economic loss without accompanying physical damage. The courts have repeatedly applied the Robins rule in the limitation context.

Therefore, the District Court correctly applied the Robins rule and dismissed the claims of the petitioners, and the appellate court correctly affirmed the dismissal.

ARGUMENT

POINT I.

SINCE NO SPECIAL OR IMPORTANT REASON EXISTS AND THERE IS NO CONFLICT BETWEEN THIS DECISION AND THE DECISION OF ANOTHER CIRCUIT, THE PETITION SHOULD BE DENIED.

This court set forth the considerations governing review on writ of certiorari in Supreme Court Rule 17.1:

> A review on writ of certiorari is not a matter of right, but of judicial discretion and will be granted only when there are special and important reasons therefor. The following, while neither controlling or fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (A) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with the state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

> (C) When a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court. (Emphasis added.)

This case deals with no novel question in federal law: well-established legal standards have been applied to the delay claims at issue.

No court below has differed in any respect with any other circuit as to the applicable standard; the affirmance in the Eleventh Circuit was per curiam.

No conflict exists among the circuits requiring resolution by this Court.

The petitioners failed to request a rehearing en banc.

The only issue the petition presents is whether the District Court

and the Eleventh Circuit reached the correct conclusion on the legal sufficiency of the delay claims. Petitioners ask this Court to take a third look at the sufficiency of the allegations of the delay claims; to re-engage in the mere application of well-settled law to the alleged facts of the claim. These are hardly the sorts of "special and important reasons" called for by Rule 17.1.

POINT II.

SINCE THE DECISION BELOW CORRECTLY FOLLOWED THE RULE ESTABLISHED BY THIS COURT IN 1927 AND FOLLOWED BY ALL THE CIRCUITS, THE PETITION SHOULD BE DENIED

A. Since The Complaint As A Matter Of Law Failed To State A Claim The Trial Court Correctly Dismissed It.

A party seeking dismissal of a complaint for failure to state a claim upon which relief may be granted carries a difficult--but not impossible--burden. Webb v. Standard Oil Co., 414 F.2d 320 (5th Cir. 1969). This Court, in Conly v. Gibson, 355 U.S. 41, 45-46 (1957) held:

> [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no facts in support of his claim which would entitle him to relief.

On consideration of motions to dismiss, a court need not accept allegations that are mere: "legal conclusions based upon legal conclusions," Associated Builders, Inc. v. Alabama Power Co., 505 F.2d 97 (5th Cir. 1974), "unsupported conclusions", Stanton v. United States, 434 F.2d 1273 (5th Cir. 1970), "unwarranted inferences," Highland Dairy Inc. v. Kroger Co., 402 F.2d 968 (8th Cir. 1968), cert. denied 395 U.S. 961, "unwarranted deductions," id., or "sweeping legal conclusions cast in the form of factual allegations," Pauling v. McElroy, 278 F.2d 252 (D.C. Cir. 1960), cert. denied, 364 U.S. 835 (1960). Although the court must accept all well-pleaded allegations in the complaint as true, a mere allegation that the claimants have been damaged is

not enough. Clebanow v. New York Produce Exchange, 344 F.2d 294 (2nd Cir. 1965); Bustop Shelters Inc. v. Convenience and Safety Corp., 521 F.Supp. 989 (S.D.N.Y. 1981).

Applying these standards the petitioners' delay claims failed to state a claim upon which relief could be granted as a matter of law, for separate and independently determinative reasons. The District Court and the Court of Appeals were correct in so holding.

B. Since Delay Claimants Showed No Physical Damage Or Damage To A Special Interest The Claims Were Properly Dismissed.

A vessel owner cannot recover for losses which are solely economic in nature, sustained without actual physical impact or damage, arising from delay

in either entering or departing a port because of a blocked ship channel. Robins Drydock & Repair Co. v. Flint, 275 U.S. 303, 309, 310 (1927) controls this issue. Robins held that a party may not recover for economic losses not associated with physical damage.

Here, the delay claimants tried to characterize their various causes of actions so as to avoid the Robins holding. But in reality, they are engaging, to use one commentator's term, in "word games." Talley, A Well-Plead Complaint -- The Key to Recovery of Economic Damages for Delay in Admiralty, 9 Fla.St.U.L.Rev. 351 (1981), citing Dick Meyers Towing Service, Inc. v. United States, 577 F.2d 1023 (5th Cir. 1978), cert. denied 440 U.S. 908 (1979). Petitioners characterized their claims

as stemming from breach of a fundamental duty not to obstruct navigable waters, maritime tort, tort indemnity, or policy considerations.

All of these factors were present at the time of Robins. However, delay claimants attempt to distinguish Robins by arguing that the maritime duty to navigate with care and the maritime right to use the navigable waters of the United States cannot be decided on principles enunciated in a decision which did not consider these "interests." This distinction lacks merit.

> "[D]amage suffered [by] loss of navigation rights in the Santa Barbara Channel and harbor is no different in kind from that suffered by the public generally."

Oppen v. Aetna Ins. Co., 485 F.2d 252, at 260 (9th Cir. 1973).

The questions are whether a duty runs to a legally protected interest of these claimants, and whether the damage is too remote, not whether there is a duty or "someone" not to obstruct the channel.

In his memorandum opinion in the instant case, District Judge Carr said: "[T]his court is unmoved by the delay claimants' contention that their claim sounds in maritime tort, common law negligence and nuisance." Petitioner's Appendix A-10 at A-16.

Similar attempts to avoid Robins have been made before, but have failed. The Fifth Circuit noted in Dick Meyers Towing Service Inc. v. United States, 577 F.2d 1023 (5th Cir. 1978), cert. denied 440 U.S. 908 (1979):

> Appellant's attempt to avoid the effect of the conventional rule by couching his claim in the language of private action based on a public nuisance is unavailing. Again, the difficulty with appellant's case is that he seeks recovery for negligent interference with his business expectancies. Rephrasing the claim as a public nuisance claim does not change its essential character.

577 F.2d at 1025, fn. 4.

Judge Wisdom in Louisville & N.R. Co. v. M/V Bayou Lacombe, 597 F.2d 469, 472 (5th Cir. 1979) said, "Robins reflects the state of the law in this circuit." In Dick Meyers, the court noted:

> . . . The law has traditionally been reluctant to recognize claims based solely on harm to the interest in contractual relations or business expectancy. The critical factor is the character of the interest harmed. . . . [A] plaintiff may not recover for the interference with his contractual relations

> unless he shows that the interference was intentional or knowing.

577 F.2d at 1025.

In Kaiser Aluminum & Chem. Corp. v. Marshland Dredging Co., 455 F.2d 957, 958 (5th Cir. 1972) plaintiff's manufacturing plant suffered interruption of gas fuel service when a barge's dropped anchor punctured an underwater gas pipeline. The court affirmed summary judgment for the defendant vessel owner on the basis of the Robins rule that "a tort to the person of one man does not make the tortfeasor liable to the other merely because the injured person was under a contract with the other unknown doer of the wrong." General Foods Corp. v. United States, 448 F.Supp. 111 (D.Md. 1978) "no cause of action will allow for a negligent, as opposed to intentional,

interference with contract or business rights. . . ." id. at 112; Complaint of Bethlehem Steel Corp., 449 F.Supp. 681 (N.D.Ohio 1977), aff'd 631 F.2d 441 (6th Cir. 1980), 22 ships denied claims for interruption of vessel traffic caused by damage to bridge over St. Lawrence Seaway:

> The general law is that damage is not recoverable even where it might have been foreseeable and where the proper causal relationship between the tortious act and damage exists.

Id. at 685.

The most recent case on point is Marine Nav. Sulphur Carriers v. Lone Star Indus., 638 F.2d 700 (4th Cir. 1981). The court distinguished decisions of the First and Ninth Circuits allowing

recovery of damages for economic loss in the oil pollution context stating:

> On this appeal claimants contend that their claim should have been assessed and upheld against the motion to dismiss under the legal theories of nuisance or negligence that have been employed by the First and Ninth Circuits to permit recovery of damages for economic loss suffered by clam diggers and commercial fishermen as a result of oil spill injuries to aquatic life. See Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974); Burgess v. M/V TAMANO, 370 F.Supp. 247 (D.Me. 1973), aff'd mem. 559 F.2d 1200 (1st Cir. 1977). Expressing no opinion on the merits of those decisions in the oil pollution context, we think the principle they adopt is inapposite to claims of indirect economic loss resulting from physical collision of vessels.

638 F.2d 700, 702. (Union Oil and Burgess both involved physical damage to marine life in which the plaintiffs had

a special interest, see pp. 22, 23 infra.)

The Fourth Circuit while recognizing the possibility of a special duty owed by oil spillers to persons having a special proprietary interest in marine life declined to extend that duty to purely economic claims affirming the District Court's dismissal of those claims.

C. Since No Damage To The Delay Claimants Exists Which Differs From That Suffered By The Public At Large, The Claim Was Properly Dismissed.

In Re Kinsman Transit Co., 388 F.2d 821 (2nd Cir. 1968) relied on by petitioners for conflict, supports respondents' position. In Kinsman, the lower court refused to allow delay

claims involving negligent interference with contractual relations, since Robins barred these claims in the absence of either intentional interference or knowledge of the contract. The Second Circuit, while choosing not to rely on Robins, still reached the same result and found no satisfactory reason to differentiate between contract rights and other legally protected interests. The court concluded that the connection between the defendant's negligence and claimant's damages was too tenuous and remote, upholding the lower court in refusing to permit recovery. Id. at 825.

In Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974) oil pollution "caused a diminution of aquatic life in the Santa Barbara Channel" in which the

claimants had a direct interest, "thus caus[ing] injury to plaintiffs' business. 501 F.2d 568. Compare with Oppen v. Aetna Ins. Co., 485 F.2d 252, 260 (9th Cir. 1973).

In Burgess v. M/V TAMANO, 370 F.Supp. 247 (D.Me. 1973), aff'd mem. 559 F.2d 1200 (1st Cir. 1977), the court found that the fishermen and clam diggers had a "special interest, quite apart from that of the public generally, to take fish and harvest clams from the coastal waters of the state of Maine" (370 F.Supp. at 250) but still applied the Robins rule to deny recovery for mere economic loss uncoupled with a "special" interest to other businesses suffering economic loss from the pollution, Id. at 251, even fishing camps injured by draining lakes. Citing,

Prosser, Law of Torts Section 88 at 591 (4th ed. 1971).

D. Since Allowance Of Delay Claims Unaccompanied By Physical Or Special Damage Would Allow Recovery For Remote, Unforeseeable, And Speculative Damages And Increase The Class Of Plaintiffs Without Limit, Public Policy Supports The Decision Below.

Economic damages are suspect. They are "speculative," remote," "difficult of proof," "unforeseeable." To allow economic damages opens up a limitation proceeding to numerous unforeseen claimants. On the other hand, to allow economic damages to one who has already suffered physical damage does not increase the number of claimants or the scope of duty. This precise point, increasing the number of claimants,

emphasizes the difference between damages connected with physical damage and those unrelated. That distinction was made many years ago and this court has continued to recognize it; policy considerations applicable then are applicable now.

The Restatement (2nd) of Torts, Sec. 766C at 23, 24 (1979) provides there is no liability for pecuniary harm not derived from physical harm to the other, if that harm results from the act of negligently (a) causing a third person not to perform a contract with the other or (b) interfering with the other's performance of his contract or making the performance more expensive or burdensome. An example given in the Restatement comment is:

> A has contracted to tow a barge owned by B between two ports. Before the contract can be performed, C. negligently sinks the barge, and A is prevented from towing it and so deprived of the profit made out of the towage fee. C is not liable to A.

Id. at 24.

E. Because The Decision Of The District Courts Follows The Path Of Parallel Uniformity With British Law The Petition Should Be Denied.

The Courts of the United States have for years followed a course of parallel uniformity with British law. Wherever possible, U.S. courts have tried to keep Admiralty and Maritime law on the same course with the British. Calmar S.S. Corp. v. Scott, 345 U.S. 427, 433 (1953); Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co., 263 U.S. 487, 493 (1924); Cory v. Burr, 9 Q.B.D.

463, 469 (C.A. 1882), aff'd 8 App. Cas. 393 (H.L. 1883); The Spot Pack, (not reported in F.2d) 1957 A.M.C. 655, 661 (5th Cir. 1957); Link v. General Ins. Co. (The Roustabout), 56 F.Supp. 275, 276 (W.D.Wash. 1944); see generally, Tetreault, The Hull Policy: The Inchmaree Clause, 41 Tul. L.Rev. 325, 344 (1967) and Lord Diplock, The Admiralty Law Institute: Closing Remarks, 41 Tul. L.Rev. 433, 434 (1967).

J. D. Heydon, in Economic Torts 1 (Sweet and Maxwell, 1973) says:

> The scope of the rule that purely financial loss caused by negligence is irrecoverable can best be seen by decided examples . . . a tug company [cannot] recover towing fees lost because of the negligent destruction of ship towed by the defendant; fishermen who lost their share of a catch because another ship negli-

> gently damaged theirs could not recover against its owners; . . .

Heydon's reasons supporting the rule are that purely financial loss is "unforeseeable," "too remote," Id. at 5, "less important than physical injury," Id.; and "fear [of] double recovery by the plaintiff," Id., "fear of collision and extravagant contracts between men by which . . . might be made a source of splendid profit to the other," Id.

Heydon also reasons that though a tort will have narrow physical consequences it may have very wide economic effects on those with whom:

> . . . the plaintiff had business or family relations; hence the defendant, in the interest of preserving his freedom of action, should be spared large liabilities.

Id. at 6.

"Too many claims would be made for one tort."

Id. at 6.

[Thus] a defendant who negligently destroyed a factory would be liable not only to the owner, but the workmen, customers or and suppliers to the factory, and the owners of local services which profit from the factory. The point is supported by the fact that financial loss consequent or parasitic on the claim for physical damage are recoverable, for this does not increase the number of plaintiffs, merely the amount recovered by a plaintiff.

This 'floodgates of litigation' argument . . . is generally a discredited one, but in this area it has much force. It may seem harsh to deny the innocent plaintiff a remedy; but the risk of financial loss can be spread. . . . . It is socially cheaper for this to happen than for a large number of new suits to be brought: The professional and governmental costs of the latter are high. Thus the general rule serves less to exclude than to channel claims so as to spare

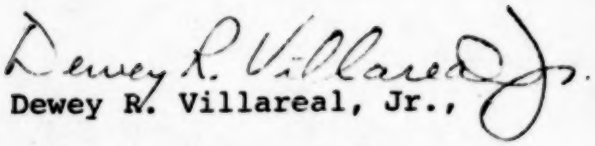
> the defendant from more than one suit. (emphasis added).

Id. at 6.

CONCLUSION

The delay claims were properly dismissed. This case involves no conflict among the circuits, nor does it involve any legal issue of broad significance. Public policy and the need for uniformity in the general maritime law require that the loss lie where it falls, where it can be more economically distributed. The petitioners merely ask this court to take another look at the application of settled legal principles, a task already performed by the district judge and the three circuit judges, who were uniform in their conclusion. The petitioners failed to seek a rehearing en banc. For these reasons, the peti-

tion for writ of certiorari should be denied.



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As Counsel of Record for Petitioners I acknowledge service of the Respondent's Brief in Opposition this 3 June 1982.

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